STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED July 18, 2006
v	No. 247391 Jackson Circuit Court
KATHERINE SUE DENDEL, a/k/a KATHERINE SUE BURLEY, Defendant-Appellant/Cross-Appellee.	LC No. 02-002915-FC

Before: Borrello, P.J., and Saad and Wilder, JJ.

WILDER, J. *(dissenting)*

I must respectfully dissent. I would affirm on the basis that the trial court did not err in concluding that defendant failed to establish prejudice as the result of deficient performance by trial counsel.

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id*. at 579. We review the trial court's factual findings for clear error and review de novo its constitutional determination. *Id*.

To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. That is, defendant must show that counsel's error was so serious that the defendant was deprived of a fair trial, i.e., the result was unreliable. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Unlike the majority, I cannot conclude that defendant was deprived of a fair trial. The trial judge conducting the *Ginther*[1] hearing was also the finder of fact in the non-jury trial. In denying defendant's motion for new trial following the *Ginther* hearing, the trial judge specifically noted that while expert testimony to refute the medical examiner's opinion on the decedent's cause of death "would have made the case better for the defense[2] . . . there was other evidence, admittedly all circumstantial, but there was a lot of other evidence" to support the prosecution theory that defendant died of insulin shock.[3] I find no basis to conclude that this finding by the trial court is clearly erroneous. Since it was not clear error to hold that the totality of the evidence was sufficient to conclude beyond a reasonable doubt that defendant was guilty of second-degree murder, I respectfully disagree with the majority's determination that defendant has shown it to be reasonably probable that the result of the proceeding would have been different. The fact-finder himself concluded the opposite by expressly stating on the record that had the expert testimony that decedent died of a multiple drug overdose and not of insulin shock been offered at trial, he nevertheless, given the weight of the contrary evidence, both direct and circumstantial,[4] would have still found defendant guilty of second-degree murder.[5]

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] Based on trial counsel's cross examination of the medical examiner at trial, the defense argued in part that decedent died of a multiple drug overdose and not of insulin shock. However, trial counsel did not call a forensic pathologist as a defense expert witness at trial to offer direct testimony to support this theory.

[3] The trial judge did not specify the "other evidence" supporting the prosecutor's theory; however, in finding defendant guilty at the time of trial, the trial judge found that defendant had had the opportunity to inject the decedent with insulin and that she admitted being aware that there would be no trace of insulin in decedent's blood after his death, that defendant was under a great deal of stress in trying to care for the decedent without receiving assistance from the decedent's family or public health agencies, and that defendant not only failed to inform decedent's family that he had died, but appeared to try to hide the fact of his death from the family.

[4] The record, in its entirety, is examined to determine whether constitutional error, i.e. prejudice, results from the omission of evidence. See, e.g., *Strickland*, *supra at* 695 ("a court hearing an ineffectiveness [assistance of counsel] claim must consider the totality of the evidence before the judge or jury"); see also *United States v Agurs*, 427 US 97, 112; 49 L Ed 2d 342; 96 S Ct 2392 (1976).

[5] This finding by the trial judge, that the medical examiner's testimony, together with other circumstantial evidence, was so persuasive as to outweigh beyond a reasonable doubt the forensic pathologist's testimony on cause of death, is at the heart of my respectful disagreement with the majority. The majority's finding that trial counsel's "failure to consult with or present the testimony of a forensic pathologist [on the cause of death] constitutes overwhelming evidence of prejudice" assumes without analysis that it is "reasonably probable" that the fact finder would have found defendant not guilty had the forensic pathologist testified on defendant's behalf at trial, even in the face of the otherwise persuasive circumstantial evidence of defendant's guilt. Nothing in the record, however, establishes that the forensic pathologist's testimony was more believable or more credible than the testimony of the medical examiner, such that its mere presentation at trial makes it "reasonably probable" that the trial would have

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For the reasons stated herein, I would affirm on the basis that defendant has failed to show that she was deprived of a fair trial or that the result of the trial was unreliable. *LeBlanc, supra* at 578.

/s/ Kurtis T. Wilder

(…continued)

resulted in another outcome, i.e. acquittal. In fact, during the *Ginther* hearing, the forensic pathologist presented by the defendant acknowledged on cross-examination that while he disagreed with the medical examiner's conclusion that insulin shock was the cause of death, he could not rule out insulin shock as the cause of death. Thus, because the impact of the expert testimony was dependent upon the fact finder's evaluation of credibility, in my judgment, the record supports the trial judge's finding that there was not a reasonable probability that the outcome would have been different.